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IN THE

Supreme Court of the United States

October Term, 1989

PEABODY COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

HUBERT C. TAYLOR and DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus Curiae National Coal Association respectfully submits that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit filed in this proceeding should be granted.

Pursuant to Rule 37 of the Rules of this Court, the parties to this case have by letters consented to the filing of the brief. Copies of their letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE NATIONAL COAL ASSOCIATION

The National Coal Association ("NCA") is a trade association comprising approximately 150 members. NCA represents most of the nation's major coal producers. In addition to coal producing companies, NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, electric utilities, resource developers and state coal associations.

NCA producer members, and all other U.S. coal producers are responsible for the payment of benefits to eligible claimants under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"), in two direct ways: 1) as individual coal mine operator defendants in certain black lung cases, 30 U.S.C. §§ 932-933; and 2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF"), 26 U.S.C. § 4121. The BLDTF is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2). The BLDTF is used to pay black lung compensation awards to eligible claimants whose coal mine employment ended before January 1970; or in cases in which a responsible coal operator defendant cannot be identified, 26 U.S.C. § 9501(d). The BLDTF also pays the administrative costs of the Departments of Labor, Treasury, and Health and Human Services in operating the black lung program. Those costs amount to over $55 million in 1989.[1]

This Court is again being asked to resolve a conflict among the circuit courts over whether the Black Lung Benefits Act

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[1]U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1989) (available through the U.S. Dep't of the Treasury) [hereinafter 1989 Report, *Trust Fund, Status*].

provides black lung defendants with a fair opportunity to be heard in a case filed under the Act's "interim presumption."[2]

In 1987, in *Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987), this Court made clear that this traditional right is secured by the Act. The language of the eligibility regulation there at issue, 20 C.F.R. § 727.203 (1989), involved the invocation of the interim presumption.

This case involves an undermining of the rebuttal portion of the DOL interim presumption regulations.

The Seventh Circuit's decision in *Taylor v. Peabody Coal Co.*, 892 F.2d 503, severely restricts, if it does not effectively eliminate the ability on rebuttal of a black lung defendant to introduce "medical" evidence on the most fundamental point in a black lung case — namely whether a coal miner suffers from, is disabled by, or died due to black lung disease. Medical proof is, by and large, the only proof that matters in a black lung case. The decision below, however, mandates the payment of black lung disability or death benefits by an employer notwithstanding the proven absence of occupational disease, related disability or death. This position of the Seventh Circuit directly conflicts with the positions taken by the Sixth

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[2]The black lung benefits program, as enacted by Congress, consists of two parts. The Part B program applies to claims filed by living miners before June 30, 1973 and before December 31, 1973 for survivors' claims and is federally funded. The Social Security Administration ("SSA") administered this program. The Part C program applies to claims filed after January 1, 1974, and is privately funded. The Department of Labor ("DOL") administers this program. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 417 (1988). Both SSA and DOL have promulgated permanent and interim regulations but only the SSA interim regulations, 20 C.F.R. § 410.490 (1989), and the DOL interim regulations, 20 C.F.R. § 727.203 (1989), are directly at issue here. Both the SSA and DOL interim regulations set forth rebuttable presumptions of entitlement to black lung benefits.

Circuit in *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989), and the Third Circuit in *Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1990).

The ruling of the Seventh Circuit in *Taylor v. Peabody Coal Co.* is wrong, manifestly unjust and unreasonably would further undermine a black lung benefits program already in dire straits. The coal industry, therefore, urges this Court to review the Seventh Circuit's decision.

REASONS FOR GRANTING THE WRIT

NCA strongly supports and endorses the arguments as set forth by petitioners, and urges the Court to grant a writ of certiorari in the instant proceeding for the following reasons.

1. The Seventh Circuit's Decision is Manifestly Unjust to Mine Owners.

The critical premise of the opinion below is that mine owner defendants will not be afforded a reasonable opportunity to defend black lung claims adjudicated under an interim presumption. By prohibiting the consideration of pertinent and otherwise probative medical evidence in a rebuttal inquiry, the Seventh Circuit compels mine owners to pay black lung benefits to former employees and the survivors of deceased employees, whether or not there is any link between a worker's disability or death and employment in the mines. According to the Seventh Circuit, the necessary link is simply irrelevant.

The petitioners contend that Congress neither enacted nor intended such a result, and NCA urges the Court to carefully consider the arguments advanced in this regard. Beyond these legal points and the Due Process Clause questions they pose, however, the operative fact for coal operators is that they

have not, were not directed to, and cannot fund the excessive retroactive liabilities imposed. Since its original enactment, the Act has provided that no mine operator may be held responsible for total disability or death due to pneumoconiosis unless the miner suffers an adverse health effect and it arises at least in part out of coal dust exposure in the miner's employment with the mine operator. 30 U.S.C. § 932(c).

All claims subject to an interim presumption were filed prior to April 1, 1980, and the payment of each such claim is secured for the liabilities imposed under 30 U.S.C. § 932 only. That is the limit of the liability imposed by the Act. 30 U.S.C. § 933(a). All insuring arrangements devised to fund these liabilities were fixed on or before April 1, 1980, and none of them are even arguably subject to revision. *See* 20 C.F.R. pt. 726 (1989). The reasonable expectations reflected in these prior arrangements contemplate a risk of liability only where the essential link between adverse health effects due to dust exposure and the employment of the miner is present.

The link is a matter of medical fact. Its presence can be tested only in light of competent medical proof. In prohibiting the adjudication of ultimate facts in light of the only evidence that matters, the court below consigns the link to irrelevancy and thus deprives the black lung program and its carefully designed benefit funding mechanisms of any rationality. Congress could not have expressly enacted so unreasonable a law and NCA submits that Congress did not do so.

2. The Implications for the Coal Industry's Obligations to the Black Lung Disability Trust Fund are Significant.

The tax paid by coal producers into the BLDTF is currently set at $1.10 per ton on underground-mined coal and

$.55 per ton on surface-extracted coal. 26 U.S.C. § 4121(a), (b).[3] The BLDTF has collected over $5.66 billion in tonnage taxes from coal producers since 1978.[4] In fiscal year 1989, the nation's coal producers paid over $563 million into the BLDTF in tonnage taxes.[5]

Despite these substantial tax revenues there has been a continuing shortfall between black lung payment obligations of the BLDTF and the income from the producers' tax. Indeed, the BLDTF has paid out over $8.64 billion in benefits since 1978,[6] and in fiscal year 1989, disbursed over $593 million in benefits.[7] The massive growth in BLDTF liability is largely attattributable to the approval of approximately 96,000 previously denied claims by the Department of Labor (and to a lesser extent, the Social Security Administration) under the requirements of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), including the 20 C.F.R. § 727.203 interim presumption.[8] The approval rate greatly *exceeded* all Congressional projections.[9]

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[3]National Coal Association has provided information to this Court similar to that provided below showing the severe insolvency problems of the BLDTF. The information supplied here is the most recent information available.

[4]Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985) [hereinafter 1985 Joint Comm. on Taxation *Summary*]; and information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Apr. 27, 1990).

[5]1989 Report, *Trust Fund, Status, supra* note 1.

[6]*See supra* note 4. This does not include costs of administration.

[7]1989 Report, *Trust Fund, Status, supra* note 1.

[8]Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Dep't of Labor).

[9]H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1978 amendments and the pro-

3. The Insolvency of the Black Lung Disability Trust Fund has Led to a Substantial Increase in Coal Industry Tax Liability to Stabilize the Fund.

To try to meet the shortfall between compensation levels and BLDTF revenue, the producers' tax has been increased twice from the 1978 rate of $.50 per ton on underground coal and $.25 per ton on surface-mined coal.[10] In 1981, the tax was increased 100% to $1.00 per ton (underground) and $.50 per ton (surface).[11] In 1985, the Administration proposed to again raise the tax, this time by 50%. Congress, however, acknowledging the coal industry *was in financial difficulty and should not be saddled with added black lung taxes, enacted only a 10% tax increase to reach the current levels of $1.10 per ton (underground) and $.55 per ton (surface).*[12]

In addition to the two tax increases, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. These advances must be repaid by the BLDTF to the general treasury, with interest.

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mulgation of 20 C.F.R. § 727.203(a) (1989), fewer than 5,000 claims had been approved under Part C. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, 97th Cong. 1st Sess., *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 23 (Comm. Print 1981).

[10]Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a), 92 Stat. 11 (1978).

[11]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981).

[12]*See* remarks of Senators Heinz and Warner, 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985). Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §13203(a), 100 Stat. 312 (1986) [hereinafter 1986 BLDTF Amendment]. 26 U.S.C. § 4121(a), (b).

26 U.S.C. § 9501(c)(d)(4).[13] The present cumulative debt of the BLDTF in unpaid advances and interest is approximately $3.049 billion, of which $1.032 billion is accumulated interest on advances.[14]

Under a 1981 amendment to the Internal Revenue Code,[15] the producers' tonnage tax was to revert to the lower 1978 rate by January 1, 1996, or when there was neither a balance of repayable advances nor interest owed by the BLDTF, whichever date was earlier.[16] However, even before the Seventh Circuit decision, *the ability of the BLDTF to achieve solvency by 1996 was dubious*.[17] When the Administration attempted to increase the tax by 50% in 1985, the Department of Labor predicted that the advance and interest necessary to meet BLDTF obligations could reach $30 billion

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[13]The 1986 BLDTF Amendment placed a five-year moratorium on interest accruals with respect to advances to the BLDTF. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (1986).

[14]U.S. Dep't of Labor, *Black Lung Disability Trust Fund, Statement of Financial Condition* (Mar. 1990) (supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, to Bruce Watzman, NCA (Apr. 25, 1990)).

[15]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981).

[16]26 U.S.C. § 4121(e), *as amended by* the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313 (1986) (prior to amendment of Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330-446 (1987)).

[17]1985 Joint Committee on Taxation *Summary*, *supra* note 4; and based on information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

by the year 2010. H.R. Rep. No. 241, 99th Cong. 2d Sess., pt. 1 at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-54. Congress, in 1987, recognized the inability of the Fund to meet its obligations. Although it rejected the President's proposal in his fiscal year 1988 federal budget to increase the tax on producers to raise $400 million in additional revenues,[18] it still imposed an additional burden on producers.

Congress extended the date by which the producers' tonnage tax is to revert to the lower 1978 rate by an additional 18 years, *i.e.*, until January 1, 2014.[19]

4. The Seventh's Circuit's Decision Would Contribute to the Financial Difficulties of the Black Lung Disability Trust Fund.

The chronic insolvency of the BLDTF arises as a result of the exceptionally generous entitlement formula contained in the Department of Labor's interim presumption, *i.e.*, 20 C.F.R. § 727.203. Coal tax increases and the executive branch's requests to Congress for still larger increases arise solely within this context. None of the proposals were generated by any expectation or belief that the BLDTF needed revenues sufficient to pay Department of Labor claims under the SSA eligibility rules of 20 C.F.R. § 410.490.

The Seventh Circuit's decision will exacerbate the financial difficulties of the BLDTF and will also add significantly to the

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[18]Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988*, at 2-41. If enacted, this revenue proposal would have meant an increase of the tax to approximately $1.75 per ton on underground coal and $.88 per ton on surface-mined coal.

[19]Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503, 101 Stat. 1330-446 (1987), *amending* 26 U.S.C. § 4121(e)(2).

direct liability of individual mine owners.[20] These circumstances arise, in NCA's view, on the premise reflected in the Seventh Circuit's decision, that these statutory benefits should be available whether or not the miner really has black lung disease or is disabled for work as a result of the disease. NCA does not believe that Congress intended this result or that the Seventh Circuit was correct in reaching it.

Increased revenues will thus be needed at a time when the BLDTF is already in an exceedingly precarious financial state, *and* when the Congress has acknowledged that the coal industry should not be burdened with further new black lung taxes. The Seventh Circuit's decision will not only impede the return of the producer's tax to a lower level, it most likely will contribute to a perpetual BLDTF deficit requiring additional advances from the Department of the Treasury and concomitant tax increases.

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[20]Industry actuaries and the government view the present value of federal black lung claims at $1.5 billion dollars per 10,000 awarded claims. Information supplied by Robert K. Briscoe, Milliman & Robertson, Inc., Consulting Actuaries, N.Y., N.Y. and James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in separate telephone interviews with Herve Levin, sole practitioner, Dallas, Tex. and consultant to Milliman & Robertson, Inc., Consulting Actuaries (Apr. 27, 1990).

CONCLUSION

The holding of the Seventh Circuit is unprecedented. It assigns black lung liability without regard to any reasonable or logical theory of responsibility. NCA urges this Court to grant the writ of certiorari, and to reverse the Seventh Circuit's decision.

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